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IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Executive Order No. 13202 flatly prohibits construction managers retained by federal agencies or recipients of federal assistance from negotiating project labor agreements ("PLAs") specifying that all contractors and subcontractors working on a construction project must agree to adhere to the PLA. In contrast, the National Labor Relations Act ("NLRA"), as amended through NLRA §§8(e) and (f), 29 U.S.C. §§158(e) and (f), expressly authorizes a construction manager retained by a property owner to negotiate such PLAs with construction unions on construction projects in and affecting commerce, including federal and federally assisted construction projects. This case, challenging Executive Order No. 13202 as an improper intrusion into the exclusive NLRA regulatory regime established by Congress, raises two questions:

1. Whether Executive Order No. 13202 is "regulatory" government procurement action that is subject to preemption analysis or "proprietary" action that is immune from such analysis; and

2. Whether Executive Order No. 13202 is government procurement action that, under the NLRA's preemption principles, improperly intrudes into the exclusive labor relations regulatory scheme established by Congress.

PARTIES

Petitioners Building and Construction Trades Department, AFL-CIO, City of Richmond, California, and the Contra Costa Building and Construction Trades Council were plaintiffs-appellees in the proceedings before the Court of Appeals.

Defendants-appellants in the proceedings below were Joe Allbaugh, Director of the Federal Emergency Management Agency; Mel Martinez, Secretary of the U.S. Department of Housing and Urban Development; Norman Y. Mineta, Secretary of the U.S. Department of Transportation; Thurman M. Davis, Sr., then-Acting Administrator, U.S. General Services Administration, and Member, Federal Acquisition Regulatory ("FAR") Council; Donald H. Rumsfeld, Secretary, U.S. Department of Defense, and Member, FAR Council; Daniel S. Goldin, then-Administrator, National Aeronautics and Space Administration, and Member, FAR Council; and Henri Jamioy Quistial, then-Administrator for Federal Procurement Policy, Office of Management and Budget, and Member, FAR Council.

Since the close of the litigation below, several of the individual government parties have changed. Stephen Perry has been appointed Administrator, U.S. General Services Administration, and Member, FAR Council, replacing Thurman M. Davis. Sean O'Keefe has been appointed Administrator, National Aeronautics and Space Administration, and Member, FAR Council, replacing Daniel S. Goldin. Finally, Angela B. Styles has been appointed Administrator for Federal Procurement Policy, Office of Management and Budget, and Member, FAR Council, replacing Henri Jamioy Quistial.

There are no parent companies or nonwholly owned subsidiaries involved.

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PETITION FOR A WRIT OF CERTIORARI

The Building and Construction Trades Department, AFL-CIO, the City of Richmond, California, and the Contra Costa Building and Construction Trades Council petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit, to review the decision and order in *Building and Construction Trades Department, AFL-CIO, et al. v. Joe Allbaugh, Director, Federal Emergency Management Agency, et al.*, 295 F.3d 28 (D.C. Cir. No. 01-5436, July 12, 2002).

OPINIONS BELOW

The opinion of the District of Columbia Circuit is reported at 295 F.3d 28, and is reprinted as Appendix A in the Appendix ("Pet. App.") to this *certiorari* petition. *See* Pet. App. 1a-14a. The decision of the United States District Court for the District of Columbia is published at 172 F. Supp.2d 138, and is reprinted as Appendix B. *See* Pet. App. 15a –73a.

JURISDICTION

The Court of Appeals' order was issued on July 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Executive Order No. 13202, 66 Fed. Reg. 11225 (Feb. 17, 2001), and its amendment, Executive Order No. 13208, 66 Fed. Reg. 18717 (April 11, 2001), are reprinted as Appendices C and D. *See* Pet. App. 74a-79a. Sections 8(e) and 8(f) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(e) and 158(f), are reprinted in relevant part as Appendix E. *See* Pet. App. 80a.

STATEMENT

On February 17, 2001, President George W. Bush signed four Executive Orders dealing with various labor relations matters. At issue in this case is Executive Order No. 13202, which "establish[es] the policy of the [Executive] with regard to the use of [project labor agreements] in federal and federally funded construction contracts." Pet. App. 2a.[1]

In its operative terms, the Executive Order flatly prohibits construction managers acting on behalf of a federal agency or a recipient of federal assistance from negotiating a project labor agreement ("PLA") binding on all the contractors and subcontractors doing work on a federal or federally-assisted construction project. The policy on PLAs that the Executive Order promulgates is directly contrary to Congress' policy, as stated in the National Labor Relations Act ("NLRA"), which explicitly authorizes the negotiation and implementation of the PLAs banned by the Executive Order.[2] We therefore

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[1] *See also* Executive Order No. 13201, 66 Fed. Reg. 11221 (Feb. 22, 2001) (requiring federal contractors to post notices informing employees of their NLRA right not to join a union); Executive Order No. 13203, 66 Fed. Reg. 11227 (Feb. 22, 2001) (dissolving intragovernmental councils on labor-management cooperation); and Executive Order No. 13204, 66 Fed. Reg. 11228 (Feb. 22, 2001) (rescinding an Executive Order that required new contractors providing services in federal buildings to give hiring preferences to employees who performed the same functions for the previous contractor).

[2] Section 1(a) of the Executive Order provides that "[t]o the extent permitted by law," no federal agency or construction manager acting on the agency's behalf shall, "in its bid specifications, project agreements, or other controlling documents" for a construction project "[r]equire or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same or other related construction project(s)." Section 3 imposes the same prohibitions on recipients of federal grants and financial assistance and parties to cooperative agreements, and on construction managers acting on their behalf. The full text of Executive Order No. 13202 is reprinted at Pet. App. 74a.

begin by outlining the NLRA's policy insofar as it relates to PLAs, and then proceed to describe the Executive Order's counter-policy and its effects.

1. The NLRA, as amended, reflects Congress' recognition of the peculiarities of the contracting and employment systems in the construction industry, and Congress' specific intent to structure national labor policy to accommodate these peculiarities. The two salient points are these:

First, as this Court has written, the construction industry's labor relations pattern is different from that of the manufacturing and service industries in three respects: "the short-term nature of employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry." *Building and Construction Trades Council v. Associated Builders and Contractors,* 507 U.S. 218, 231 (1993) ("*Boston Harbor*").

Second, the work on a construction job is rarely, if ever, let to a single entity that performs all of the work with and through its own employees. Rather, construction work is commonly let to multiple contractors and subcontractors, each performing part of the job. *See Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 657 (1982).

To accommodate these construction industry realities, the 1959 Congress, in amending the NLRA, enacted two provisions that apply only to construction. The first is § 8(f), which "explicitly permits employers in the construction industry—but no other employers—to enter into prehire agreements. Prehire agreements are collective bargaining agreements [that establish the terms and conditions of employment] prior to the hiring of any employees." *Boston Harbor,* 507 U.S. at 230. Second, the 1959 Congress passed an "amendment adding a proviso to subsection (e) [which]

permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site *unless they agree to become bound by the terms of that labor agreement.*" *Id.* (emphasis added).[3] Taken together, §§ 8(e) & (f) permit a construction manager/general contractor, retained by the construction project's owner, to manage the construction by bargaining collectively with construction industry unions to establish the terms and conditions that will apply for *all* work to be performed by the contractors and subcontractors on the project, *before the contractors and subcontractors have been selected, the employees have been hired and the work has been commenced.*

In enacting these construction industry provisions, Congress validated a long-standing practice whereby construction managers/general contractors retained by construction project owners negotiated master labor contracts establishing a uniform system of labor relations for large, complex construction projects—*i.e.,* of negotiating project labor agreements.[4] As described by the U.S. Department of Labor, the first PLAs were designed to

> meet[] the needs of massive projects such as the construction of the St. Lawrence Seaway or the Alaska Pipe Line, which last for several years, pose special

[3] Section 8(e) generally prohibits "hot cargo" agreements, *i.e.,* agreements between an employer and a union requiring the employer to refrain from doing business with a third party. The construction industry proviso—an exception to this general prohibition—allows construction industry parties to specify that work on a project will be contracted and subcontracted only to employers that agree to be bound by the prehire agreement. *Boston Harbor,* 507 U.S. at 230; *see Woelke & Romero,* 456 U.S. at 657.

[4] In fact, federal agency and federally assisted construction projects have been developed under PLAs since at least 1938. U.S. GENERAL ACCOUNTING OFFICE, PROJECT LABOR AGREEMENTS: THE EXTENT OF THEIR USE AND RELATED INFORMATION 4 (May, 1998).

> problems of manning and work rules, and involve huge sums of money, a consortium of several contractors, and a great deal of public interest and often public funds. Contractors on such projects, and their eventual owners, want continuity of production, more favorable treatment of costs . . . . than local agreements typically provide, uniform shift and other conditions for all trades, and the help of national union officials experienced in securing manpower and administering agreements on large projects. . . . For contractors and owners, one of the chief attractions of such agreements has been their recent inclusion of a clause promising no strikes for the duration of the project. [U.S. DEPT. OF LABOR, LABOR MANAGEMENT SERVICES ADMINISTRATION, THE BARGAINING STRUCTURE IN CONSTRUCTION: PROBLEMS AND PROSPECTS 14 (1980).]

By negotiating a PLA that governs the terms and conditions of employment for an entire project and binds all contractors and subcontractors that do any work on the site, the construction manager/general contractor provides for the efficiencies that are gained (i) by standardizing and tempering the trade-by-trade or contractor-by-contractor work rules, shift schedules, overtime practices and other labor relations policies that otherwise prevail in the locality; (ii) by adopting orderly and effective referral systems, that ensure a steady supply of qualified craft workers; and (iii) by guaranteeing that there will be no strikes or lockouts on the site for the duration of the project and establishing mechanisms to quickly resolve any employment disputes that may arise. *See* D.Q. MILLS, INDUSTRIAL RELATIONS AND MANPOWER IN CONSTRUCTION 40 (1972).

2. In the face of the foregoing, the Executive Order, in blanket terms, prohibits any construction manager retained by a federal agency or a recipient of federal assistance to manage a construction project from negotiating a project labor agreement binding on all the contractors and subcontractors

on the project. Executive Order No. 13202, §§ 1(a) and 3; Pet. App. 74a-75a.[5] While it does so by indirection, the Executive Order goes on to bar the negotiation and implementation of *enforceable* PLAs on federal or federally assisted construction projects by prohibiting federal agencies and recipients of federal assistance from including the PLA requirement in the project's bid specifications. *Id.* Public contracting laws—which generally call for competitive bidding and provide that the public construction project owner must maintain control over the bidding process—require that the bid specifications provide notice of all material conditions for working on the site. Thus, a public works project PLA can only be implemented in the manner intended—*i.e.*, as a project-wide collective bargaining agreement binding on all contractors/subcontractors on the job—if the public entity letting the contracts makes adherence to the PLA a condition in the bid specifications. Pet. App. 2a.

3. The *Boston Harbor* case provides an illustrative example of how the NLRA construction industry collective bargaining regime works and how the Executive Order's regime overrides the NLRA's. The Massachusetts Water Resources Authority ("MWRA"), under court order to clean up the polluted harbor, retained a project manager, Kaiser Engineers, Inc., to supervise the construction activity at the project. "Kaiser suggested to MWRA that Kaiser be permitted to negotiate an agreement with the [local building trades council] that would assure labor stability over the life of the project. . . . MWRA accepted Kaiser's suggestion, and Kaiser accordingly proceeded to negotiate" a PLA that established the employment terms for the project, including "a requirement that all contractors and subcontractors agree to

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[5] The miniscule exemption for a waiver of the Order's ban "in order to avert an imminent threat to public health or safety or to serve the national security," Executive Order No. 13202 § 5, Pet. App. 75a-76a, is so narrowly drawn as to be of no consequence.

be bound by the agreement." *Boston Harbor*, 507 U.S. at 221-22. Massachusetts law required the MWRA to administer the bidding process and to include all relevant contract terms "in the form of a bid specification." *Id.* at 221 and n.1. The MWRA accordingly included in the bid specifications for the project the requirement that all contractors and subcontractors abide by the PLA's terms. *Id.* at 222.

The Boston Harbor PLA was a "valid labor contract under §§ 8(e) and (f)." 507 U.S. at 230 ("[T]hose sections explicitly authorize this type of contract between a union [like a building trades council, of which building and construction employees are members,] and an employer like Kaiser, which is primarily engaged in the construction industry, covering employees engaged in that industry."). And this Court found that the MWRA's action, as "owner of [the] project," in "[enforcing] an otherwise lawful prehire collective bargaining agreement negotiated by private parties," *id.* at 220, was fully consistent with the NLRA, *id.* at 232-33. Had the Executive Order been in effect, however, it would have barred Kaiser, the project manager for the Boston Harbor project, from negotiating the PLA and would have barred the MWRA from including in the bid specification the condition that all successful bidders must abide by the PLA's terms.

4. To be sure, the Executive Order states that it does not "prohibit contractors or subcontractors from voluntarily entering into agreements" authorized by § 8(e). Executive Order No. 13202 § 1(c); Pet. App. 75a. But that statement does nothing to relax the Order's flat ban on the negotiation and implementation of PLAs on federal and federally assisted construction projects. First, as discussed, the point of a project-wide labor agreement is to enable the construction manager/general contractor responsible for the overall operation to make decisions, *in the planning stages for the project,* concerning labor costs, staffing plans, site coordination, and the like, and to provide for the

implementation of those decisions in contracting and subcontracting the work on the project. And, these agreements are intended to facilitate bidding, by providing the contractors and subcontractors seeking to work on the project with a solid basis for developing realistic bids. The "permission" § 1(c) of the Order grants contractors and subcontractors to devise and implement their own labor relations policies *after* the contracts are awarded and without any assistance from a construction manager, is not the equivalent of—nor does it even approximate—the permission set forth in NLRA §§8(e) and (f), to negotiate and implement PLAs. Second, § 1(c) of the Order does not modify in any way the Order's ban on including notice of a PLA in the project's bid specifications, and, as we have seen, absent such notice a PLA cannot be made binding on the project's contractors and subcontractors.

5. The Executive Order had an immediate impact on the petitioners in this case. The Building and Construction Trades Department ("BCTD"), a labor organization comprised of fourteen national building trades unions, and its local affiliates routinely negotiate PLAs with construction managers/general contractors for large and complex construction projects. Before the Executive Order issued, Parsons Constructors, Inc. ("PCI"), the construction manager retained by the State of Maryland, and the BCTD had negotiated a PLA for Maryland's portion of the Woodrow Wilson Memorial Bridge reconstruction project, a multi-year, multi-billion dollar project the States of Maryland and Virginia are conducting with federal financial backing. By early January 2001, the State had submitted the PLA to the Federal Highway Administration ("FHWA"), and was awaiting the Agency's approval to include it in the project's bid specifications.[6] Within days after the Executive Order

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[6] Under Maryland contracting law, the State was required to maintain control over contract awards, and both state law and FHWA regulations

issued, however, FHWA advised Maryland that the Executive Order prohibited the State from taking any action to implement the PLA. Faced with construction deadlines and financially unable to forego the federal funding, the State awarded the contracts for the next construction phase without including the PLA in its bid specifications. Pet. App. 20a.

At the same time, the City of Richmond was planning two urban renewal projects, with financial assistance from various federal agencies. The City Manager had assessed the City's needs and was prepared to recommend that the City Council authorize its construction manager to negotiate PLAs with the Contra Costa Building and Construction Trades Council ("BCTC") for the projects. When the Executive Order issued, however, the City Council concluded that the City could not afford to undertake these projects without federal assistance and voted not to proceed with an authorization for the negotiation of a PLA. Pet. App. 42a.

6. On April 26, 2001, the BCTD, the City of Richmond and the Contra Costa BCTC challenged the Executive Order in the U.S. District Court for the District of Columbia, in a suit brought pursuant to 28 U.S.C. § 1331. The District Court issued a preliminary injunction on August 13, 2001, prohibiting the Government from using the Executive Order to block Maryland from implementing the PLA on the Wilson Bridge; and on November 7, that court permanently enjoined enforcement of the Executive Order.

The District Court found that by "set[ting] a blanket rule [that] does not require government agencies to act on a project-by-project basis, as was the case in *Boston Harbor,*" the Executive Order had "broad policy implications . . . . The government is using the power of its purse to control and regulate the behavior of other market participants." Pet.

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required inclusion of material conditions in the bid specifications. MD. CODE ANN. STATE FIN. & PRAC. § 13-103; 23 C.F.R. § 635.112.

App. 68a-69a, citing *Boston Harbor,* 507 U.S. at 233. Accordingly, the Executive Order "is clearly a regulatory act rather than the government 'act[ing] just like a private contractor would act.'" Pet. App. 68a, quoting from *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1336 (D.C. Cir. 1996)(additional internal citations omitted). Following the teachings of *Chamber of Commerce*—in which the D.C. Circuit held that such a regulatory government procurement action addressed to labor relations matters must be tested against NLRA preemption principles to determine whether the action "unacceptabl[y] conflict[s]" with the labor relations policy established by Congress in the NLRA, 74 F.3d at 1333-34—the District Court ruled that the Executive Order improperly intrudes into the NLRA's exclusive regulatory field. Pet. App. 62a-66a.

The D.C. Circuit reversed. The Court of Appeals set a single criterion for differentiating regulatory procurement actions subject to preemption analysis from proprietary procurement actions not subject to such analysis—"[a] condition that the Government imposes in awarding a contract or in funding a project is regulatory only when . . . it addresses employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." Pet. App. 13a (internal citations omitted). Applying that criterion, the D.C. Circuit held that the Executive Order constitutes proprietary action rather than regulatory action, and is therefore not subject to scrutiny under NLRA preemption principles.

REASONS FOR GRANTING THE WRIT

In a series of major federal statutes—including the National Labor Relations Act ("NLRA"), the Employee Retirement Income Security Act ("ERISA"), the Interstate Commerce Commission ("ICC") Termination Act of 1995, and the Telecommunications Act—Congress has established integrated statutory regimes that preempt other governmental

authorities—both Federal and State—from taking actions that conflict, or otherwise interfere, with Congress' regulatory scheme. And, under the proprietary/regulatory dichotomy articulated by this Court in *Wisconsin Dep't of Industry v. Gould,* 475 U.S. 282 (1986), and *Boston Harbor*, government procurement actions that are tantamount to regulation are subject to preemption on the same principles and to the same extent as other government regulatory actions, while proprietary government procurement actions are not subject to preemption.

Given the range and scope of these preemptive federal statutes in regulating the economy, and the range and scope of government procurement actions in the economy, the *Gould/Boston Harbor* dichotomy has generated a continuing flow of litigation on the question of which procurement actions are "regulatory" and which are "proprietary." And, that litigation has, in turn, generated a conflict in the Circuits.

In this case, the D.C. Circuit held that Executive Order No. 13202's blanket ban on the negotiation of PLAs by construction managers acting on behalf of construction owners, and construction unions on all federal and federally assisted construction projects "clearly constitutes proprietary action rather than regulation." Pet. App. 10a. Based on that holding, the Court of Appeals opined that there was no "need" to determine whether the Order "runs afoul of [the NLRA's preemption] principles." *Id.*

On this recurring question of what government procurement activity is properly characterized as "proprietary" and what is properly characterized as "regulatory"—and by extension, on the proper reading of this Court's *Gould* and *Boston Harbor* decisions—the D.C. Circuit's decision is in direct conflict with the Ninth Circuit's decision in *Dillingham Const. N.A., Inc. v. County of Sonoma*, 190 F.3d 1034 (9th Cir. 1999), and the Fifth Circuit's decision in *Cardinal Towing v. City of Bedford, Texas,* 180 F.3d 686 (5th Cir.

1999). In this regard, the D.C. Circuit's decision is also irreconcilable with the Seventh Circuit's understanding of the *Gould/Boston Harbor* proprietary/regulatory dichotomy in *Colfax Corp. v. Illinois State Toll Highway Auth.*, 79 F.3d 631 (7th Cir. 1996), and with that of the Second Circuit in *Sprint Spectrum v. Mills*, 283 F.3d 404 (2d Cir. 2002).

The D.C. Circuit's decision—and the resulting conflict in the Circuits—is of large significance to the proper effectuation of the uniform national labor policy stated in the NLRA, and as well, to the proper effectuation of the uniform regulatory policies Congress stated in such preemptive statutes as ERISA, the ICC Termination Act, and the Telecommunication Act. On the decision below—but not on the conflicting *Dillingham* and *Cardinal Towing* decisions—government procurement authorities have *carte blanche* to promulgate general rules that govern the conduct of private parties providing goods/services to the government while those parties are providing those goods/services, which conflict with the general regulatory rules stated in a preemptive federal statute. That is so:

- even though government action setting general rules of conduct for private economic actors on such matters as labor relations policy is characteristic of the government acting as a regulator, not the government acting as proprietor;
- even though there are numerous government regulatory enactments—such as the prevailing wage laws—that apply to the class of private parties providing the government with goods and services while these private parties are providing those goods and services to the government, and only to such private parties;
- even though private purchasers do not characteristically set such general rules of conduct for their suppliers;

- even though the D.C. Circuit's proprietary action concept opens the way for government procurement authorities to promulgate general rules of conduct for suppliers, which conflict with the regulatory rules Congress has enacted, and which will control in the public works construction sector of the economy—which accounts for approximately 20% of new construction in this country—and indeed, in the overall government procurement sector—which accounts for approximately 17% of the gross domestic product. STATISTICAL ABSTRACT OF THE UNITED STATES 591, 417, Charts No. 929 and 640 (2000 Ed.).

To put these general points in concrete terms, the D.C. Circuit's decision recognizes an Executive proprietary procurement power to override the NLRA with regard to the negotiation by construction managers and construction unions of PLAs on federal and federally financially assisted construction projects. And, there is no escaping the logic that the D.C. Circuit's theory equally recognizes a state procurement power (and a local power) to override the NLRA on state and state funded (and on local) construction projects—and to do so *either* by barring the negotiation of PLAs (as the Executive Order does) *or* by mandating the negotiation of PLAs.

At the very least, then, the D.C. Circuit's decision enables procurement authorities to balkanize what Congress intended to be the uniform NLRA regulation of construction industry labor relations, so that the private parties on federal and federally assisted construction projects are governed by an Executive Order on PLAs, while those on state and state assisted construction projects (and on local projects) are governed by a myriad of state (and local) orders on PLAs. And, of course, the D.C. Circuit's decision does not rest on any theory that would limit the range of general labor relations rules that government procurement authorities are entitled to establish to rules on the negotiation of PLAs. To

the contrary, on the D.C. Circuit's theory, an executive order generally establishing the labor relations policy for private entities while those private entities are providing the government with goods and services—and covering the same matters covered by the NLRA but in a different way—would be "clearly proprietary" government procurement action *not* subject to NLRA preemption.

I. THE CONFLICT IN THE CIRCUITS

(a) The D.C. Circuit concluded its discussion of whether Executive Order No. 13202 is "proprietary" government procurement action that is not subject to NLRA preemption principles or regulatory action that is subject to those principles by stating its holding in the following terms:

> A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when, as the Supreme Court explained in *Boston Harbor*, it "addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government]." 507 U.S. at 228-229. Here the Government correctly notes that "the impact of [the] procurement policy [expressed in Executive Order No. 13,202] extends only to work on projects funded by the government." Because the Executive Order does not address the use of PLAs on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as "regulatory." [Pet. App. 13a.]

We hasten to add that the *Boston Harbor* Court did not state at 507 U.S. 228-29—or anywhere else in its opinion—that *only* government procurement action addressed to employer conduct unrelated to the employer's performance of its contractual obligations to the government is regulatory conduct. Nor did the *Boston Harbor* Court state that *all* government procurement action addressed to the employer's conduct related to its performance of contractual obligations to the government is proprietary action. What the Court

stated at 507 U.S. 228-29, in discussing its *Gould* decision, is that government procurement action "addressed to employer conduct [that violates a federal statutory norm] unrelated to the employer's performance of contractual obligations to the [government]" in order "to deter [such federal statutory] violations" is a clear example of government procurement action that is "tantamount to regulation." And, *Boston Harbor* concluded its discussion of *Gould* in a manner that belies the D.C. Circuit's expansive concept of proprietary government procurement action, by limiting that concept to government action "as a market participant with *no* interest in setting policy." 507 U.S. at 229 (emphasis added).

(b) Not surprisingly then, the D.C. Circuit's proprietary/regulatory distinction ruling—and its reading of *Boston Harbor*—is in conflict with that of other circuits.

Dillingham Const. N.A. Inc. v. County of Sonoma, *supra*, presented the Ninth Circuit with a proprietary/regulatory dichotomy issue indistinguishable from the one presented in the instant case. In *Dillingham*, the "State of California argue[d] that the apprenticeship prevailing wage law"—which requires contractors and subcontractors working on state construction projects to pay prevailing wages to employees in apprenticeship programs that have not received State approval but allows such contractors to pay lower wages to apprentices enrolled in State-approved programs—"is immune from NLRA preemption because the apprenticeship prevailing wage law results from the State functioning as a mere proprietor or market participant rather than as a regulator." 190 F.3d at 1037-38.

Under the D. C. Circuit's ruling here, that argument would carry the day: the California law "addresse[d] employer [labor relations] conduct []related to the employer's performance of contractual obligations to the [State,] . . . extend[ed] only to work on [State] projects . . . [and did] not address [apprentice pay] on projects unrelated to those in

which the [State] has a proprietary interest . . . ." Pet. App. 13a. But the Ninth Circuit concluded that the "State's argument is without merit:"

> The State did not merely create apprenticeship standards in its contract with Dillingham nor were the apprenticeship standards in this case created based upon unique needs that the detention facility project presented. The apprentice prevailing wage law applies uniformly to all public works contracts executed in the State of California and is a mechanism through which the State regulates apprenticeship programs and the employment of apprentices on public works projects.
>
> * * *
>
> In contrast to [*Boston Harbor*] and as noted above, the State in this case did not establish the apprentice prevailing wage law specifically for the detention facility project and the State was not motivated by management concerns when it adopted the apprentice prevailing wage law. The State's purpose in enacting and enforcing the apprentice prevailing wage law was to regulate apprenticeship programs and wages paid on public works projects. The apprentice prevailing wage law is state regulation and is subject to NLRA preemption if it falls under one of the two NLRA preemption doctrines. [190 F.3d at 1038.]

Simply stated, on the Ninth Circuit's reading of *Boston Harbor*, but not on the D.C. Circuit's, a government procurement action that sets an across-the-board labor relations rule that governs employers and employees while they are doing work on government construction projects is a regulatory action subject to NLRA preemption, not a proprietary action that is not subject to preemption.

While *Cardinal Towing v. City of Bedford, Texas*, *supra*, arose in a markedly different statutory context from the instant case and *Dillingham*, the Fifth Circuit's reading of the

Boston Harbor proprietary/regulatory dichotomy there, like the Ninth Circuit's in *Dillingham*, is in conflict with that of the D.C. Circuit.

In the ICC Termination Act, Congress broadly preempted state and local authority over motor carriers that transport property by providing that "[a] State . . . may not enact or enforce any law, regulation, or other provision having the force or effect of law relating to a price, route, or service of a motor carrier . . . with respect to the transportation of property." 49 U.S.C. §14501(c). In *Cardinal Towing*, the question was whether the City of Bedford's bid specification for its police department's towing contract, requiring the bidder to guarantee a short response time and access to a heavy tow truck, and an ordinance directing that the successful bidder do all such towing, were state actions preempted by the ICC Termination Act. 180 F.3d at 689-90.

The Fifth Circuit noted that the preemption provision in the ICC Termination Act is almost identical to ERISA's preemption provision in expressly preempting state "laws" and defining "state law" as an action "having the force and effect of law;" recognized that courts have applied the *Gould/Boston Harbor* proprietary/regulatory dichotomy to determine whether a government procurement action is subject to ERISA preemption, citing *Associated Gen. Contractors of Amer., San Diego Chap. v. Metropolitan Dist. of Southern California*, 159 F.3d 1178, 1183 (9th Cir. 1998); and adopted that approach to determine whether Bedford's bid specification and ordinance were procurement actions subject to ICC Termination Act preemption. *Cardinal Towing*, 180 F.3d at 695.

The Fifth Circuit therefore surveyed the *Gould* and *Boston Harbor* decisions and the lower court decisions applying the *Gould/Boston Harbor* proprietary/regulatory dichotomy. And, on the basis of that survey, the *Cardinal Towing* court concluded that "[f]ollowing the logic of *Gould*, courts have found preemption when government entities seek to advance

general societal goals rather than narrow proprietary interests through the use of their contracting power," 180 F.3d at 692; and that following the logic of *Boston Harbor*, "courts have similarly shielded contract specifications from preemption when they applied to a single discreet [sic] contract and were designed to insure efficient performance rather than advance abstract policy goals," *id.* at 693.

Drawing on that review, the Fifth Circuit then synthesized the lessons of *Gould* and *Boston Harbor* into a two-part test:

> In distinguishing between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power, the key under *Boston Harbor* is to focus on two questions. First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out. [*Id.*]

In this regard, *Cardinal Towing* cautions that given "the ever present temptation to leverage the spending power" to "intrude on [the] congressional design" embodied in a preemptive federal regulatory statute, only "archetypical market behavior" by the government is properly characterized as proprietary, *id.* at 694 n. 2, *viz.*, only behavior "designed to insure efficient performance rather than advance abstract policy goals," *id.* at 693. *See also Petrey v. City of Toledo*, 246 F.3d 548 (6th Cir. 2001) (following *Cardinal Towing* and finding that the setting of towing requirements for a city police department constituted proprietary action that was not subject to preemption under the ICC Termination Act);

Tocher v. City of Santa Ana, 219 F.3d 1040 (9th Cir. 2000) (same).

In the decision below, the D.C. Circuit treated as an irrelevancy what the Fifth Circuit described as a "key" question—whether the government procurement action is action that "encourage[s] a general policy" rather than action that is "address[ed to] a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693. On the D.C. Circuit's theory, so long as the government procurement authority is imposing its general policy rule on private entities only when the entities are doing business with the government and not when the entities are doing business with third parties, the government action is proprietary. And, as the instant case makes plain, the Fifth Circuit's proprietary/regulatory test and the D.C. Circuit's test are not merely different—they are different in an outcome determinative way.

(c) The confusion in the circuit court law is deepened by court of appeals decisions that hold that government procurement action is proprietary action, but do so on a far narrower concept of proprietary action than the D.C. Circuit's conception. In *Colfax Corp. v. Illinois State Toll Highway Auth.*, 79 F.3d 631, 634-35 (7th Cir. 1996), the Seventh Circuit found that Illinois' action in including in the bid specifications for a particular project a requirement that successful bidders adhere to a PLA constituted proprietary action. In so finding, the court emphasized that the State acted to insure efficient performance on a particular project, and without any intent to set policy on the negotiation or implementation of PLAs. As the court put it, "Illinois has not enacted a statute. The [State] Authority has not passed a general rule. The [State] Authority was contracting for services on a specific contract." Since Illinois' action on its face "extended only to work on behalf of the government," Pet. App. 13a, on the D.C. Circuit's theory, the factors the Seventh Circuit took into account were not necessary—or even relevant—to the result. *See also Associated Gen.*

Contractors of Amer., 159 F.3d at 1182 (in finding that a public entity's bid specification requiring adherence to a PLA was proprietary conduct, and therefore not preempted by ERISA, the Ninth Circuit emphasized that, "[t]he bid specification applies to a discrete project. It is not a generally applicable law or regulation. It does not apply to every project done in the county.").

By the same token, the Second Circuit, in a case involving a preemption provision in the Telecommunications Act, 47 U.S.C. §332(c)(7)(B)(iv), held that a school board's inclusion of a condition in a lease for the placement of a cellular communications tower, restricting the density of radio emissions from the tower to a level below the maximum set by federal standards, constituted proprietary conduct immune from preemption. In so holding, the Second Circuit noted, "[t]here is no state or local statute or ordinance or guideline . . . at issue here. The School District entered into a single lease agreement with respect to a single building. The District did not purport to punish [the company] for any past conduct or to impose any condition with respect to any [company] tower other than that to be located on the High School." *Sprint Spectrum v. Mills*, 283 F.3d 404, 420-21 (2d Cir. 2002). S*ee also Chamber of Commerce v. Lockyer*, No. SA CV 02-0377 (C.D. Calif., Sept. 18, 2002) (holding that the D.C. Circuit decision in this case was not controlling, and that a California statute prohibiting the use of state funds to deter or promote union organizing was preempted regulatory conduct).

In sum, a proper understanding—and a proper application—of the *Gould/Boston Harbor* proprietary/regulatory dichotomy by the lower courts is critical to maintaining the integrity of Congress' exclusive statutory regulatory scheme and to doing so in a manner that permits government procurement authorities to interact with private parties in the marketplace. But the circuit court law on the proprietary/regulatory dichotomy is in conflict, and as evidenced by the

D.C. Circuit's decision here, one of the conflicting views permits government procurement authorities to act as independent policymakers, imposing general rules of conduct on suppliers doing business with the government that displace the rules Congress has enacted in an exclusive regulatory statute. The Court's intervention to settle this conflict and to elaborate the proprietary/regulatory dichotomy so as to guide the lower courts in deciding the broad range of cases that turn on the dichotomy is both warranted and needed.

II. THE D.C. CIRCUIT'S DECISION IS INCONSISTENT WITH *BOSTON HARBOR*'S REASONING AND HOLDING

The *Boston Harbor* Court began its discussion of the proprietary/regulatory dichotomy by noting two baseline propositions. *First,* "[o]ur [NLRA preemption] decisions . . . support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity [such as proprietary activity] that affects labor." 507 U.S. at 227 (emphasis in original). And *second*, government procurement actions that are tantamount to regulation are regulatory and subject to the NLRA preemption principles: "In *Gould*, we rejected the argument that the State was acting as a proprietor rather than regulator for purposes of *Garmon* pre-emption when the State refused to do business with persons who had violated the NLRA three times within five years." *Id.* at 228.

At that juncture, the Court confronted—and rejected—the argument of the plaintiffs/respondents there—which rested on a "passage from *Gould*"—that the "State as proprietor is subject to the same preemption limitations as the State as regulator." *Id.* The *Gould* passage in question states in its most pertinent part:

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But

> government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. . . . The NLRA . . . treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play. [475 U.S. at 290.]

This argument was unsound, said the Court, because it failed to recognize a basic conceptual distinction that applies in both the private sphere and the governmental sphere:

> The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. The private actors under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor. [507 U.S. at 229.]

Once this conceptual distinction between purchaser actions as a regulator and purchaser actions as a typical proprietor is appreciated, two conclusions follow. First, "[t]he fact that a private actor may 'regulate' does not mean, of course, that a private actor may be 'pre-empted' by the NLRA; the Supremacy Clause does not require pre-emption of private conduct. Private actors therefore may 'regulate' as they please, as long as their conduct does not violate the law." *Id.* And second,

> As *Gould* makes clear, however, states have a qualitatively different role to play from private parties. When the State acts as a regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the *State acts as a market participant with no interest in setting policy.*

> In *Gould*, we did not address fully the implications of these distinctions. We left open the question whether a State may act without offending the pre-emption principles of the NLRA when it *acts as a proprietor and its acts therefore are not "tantamount to regulation" or policymaking*. As explained more fully below, we now answer this question in the affirmative. [*Id.* at 229-30 (emphasis added).]

In essence, then, a purchaser participating in the market who demands that its suppliers conduct their affairs in a specified manner (i) acts as a "regulator" when its demand is based on the purchaser's "policy concerns"—in this context, its labor policy concerns—and is to further its interest in effectuating its policy preferences; and (ii) acts as a "typical proprietor" when its demand is based solely on its "profit motive" interest—its interest in purchasing a good or service efficiently and effectively—and not at all on its regulatory interest "in setting policy." The most essential point is that when government procurement action "set[s] policy," it has a hallmark of government regulatory action, and that when government procurement action "set[s] policy" in an area where Congress has set policy through an exclusive regulatory statute, it has a hallmark of government action that requires preemption analysis and review—and that cannot be categorically immunized from such analysis and review.

Thus, the MWRA's action in *Boston Harbor* as a "purchas[er of] contracting services," 507 U.S. at 231, in demanding that contractors and subcontractors working on the Boston Harbor construction project abide by the PLA negotiated by the project construction manager and the building trades council, was that of a typical proprietor in that it (i) was "in pursuit of [the State's] purely proprietary interests" in "ensur[ing] an efficient project that would be completed as quickly and effectively as possible at the lowest cost"; (ii) was analogous to permitted "private [purchaser] conduct"; (iii) was "specifically tailored" to achieving the

State's purely proprietary interest "on one particular job;" and (iv) was not in any way an attempt to establish a general policy on the negotiation of PLAs binding on contractors and subcontractors. *Id.* at 231-32. The MWRA's procurement action was therefore proprietary and not "government regulation . . . subject to NLRA preemption." *Id.* at 232.

The multiple errors in the D.C. Circuit's reading of *Boston Harbor* are patent. First, as we noted earlier and contrary to the D.C. Circuit's restatement of *Boston Harbor*, this Court neither stated nor intimated that *only* government procurement actions imposing requirements "unrelated to the employer's performance of contractual obligations to the [Government]," 507 U.S. at 229, are regulatory, or that *all* government procurement actions imposing requirements "[]related to employer's performance of [such] contractual obligations" are proprietary.

Second, the D.C. Circuit's theory distorts beyond recognition the essential point of the *Boston Harbor* analysis—that government procurement action is proprietary when the government "acts as a market participant with no interest in setting policy." 507 U.S. at 229. On the decision below, government action is proprietary when the government acts as a market participant *with an interest in setting policy*—for example, labor relations policy—for the class of private entities providing goods/services for the government while they are providing those goods/services.

That is contrary to what *Boston Harbor* says and to the basic understanding of the government as regulator and of government regulation. It runs past the point that Congress—acting in what is plainly a "characteristically . . . governmental . . . role," *Boston Harbor,* 507 U.S. at 229—routinely enacts regulatory measures that impose conditions *only* on the class of private parties providing goods/services to the government, and *only* while they are providing those goods/services. It is beyond question, as the Ninth Circuit

recognized in *Dillingham*, that such measures—which "extend[] only to work on projects funded by the Government," Pet. App. 13a—are government "regulations."

The Fifth Circuit, in marked contrast to the D.C. Circuit, took full account of *Boston Harbor* in defining proprietary government procurement action immune from preemption as action "so in keeping with the ordinary [market] behavior of a private party" and "so narrowly focused" on the government's "own interest in its efficient procurement of needed goods and services" as to rule out any inference that the government is acting on a "regulatory impulse" to "encourage a general policy." *Cardinal Towing,* 180 F.3d at 693. As the Fifth Circuit noted, testing the government's procurement actions against these indicia of "archetypical market behavior" is an important check on "the ever present temptation to leverage the spending power and thus intrude on a congressional design" set out in a preemptive regulatory statute. *Cardinal Towing,* 180 F.3d at 694 n. 2.

The Executive Order does not meet the *Boston Harbor* definition of proprietary government procurement action. It is *not* specifically tailored to a particular contract, or even to a particular type of construction project. Instead, it applies to *all* federal and federally assisted construction projects—whether court houses, bridges, dams, highways, urban renewal projects—wherever the project is located, whatever the labor relations situation in the area, however much money the federal government is providing, and without regard to any assessment of whether a PLA would further or retard the government's interest, as a purchaser, in having the project constructed as effectively and efficiently as possible, at the lowest cost. Imposing such a general labor relations rule on all private parties providing construction services to the government and to entities receiving financial assistance from the government simply cannot be considered the action of a "market participant with no interest in setting policy." *Id.* at 229.

The D.C. Circuit's theory undermines the very point of the *Gould/Boston Harbor* proprietary/regulatory dichotomy, which is to insulate from unwarranted preemption attacks government procurement action that is focused on the government's proprietary interests and is, in that critical sense, typically proprietary. For the D.C. Circuit extends the proprietary action concept so far that it insulates from preemption scrutiny policymaking in areas in which Congress has already enacted legislative policy.

In sum, this Court should grant *certiorari* in this case to correct the patent errors in the D.C. Circuit's decision and, in so doing, to restore the proprietary government procurement action concept to the narrow bounds the *Boston Harbor* Court envisaged.

III. THE EXECUTIVE ORDER IS INVALID UNDER NLRA PREEMPTION PRINCIPLES

Our two-fold position in this case is (i) that Executive Order No. 13202 is regulatory government procurement action and not proprietary action; and (ii) that the Executive Order is invalid as regulatory action that improperly encroaches into the field exclusively regulated by the NLRA.

In the first Question Presented, and for the reasons just developed, we request this Court to consider the proprietary/ regulatory dichotomy issue this case raises and that the Court of Appeals decided erroneously.

In the second Question Presented, we go on to request the Court to consider the NLRA preemption issue this case also raises and that the Court of Appeals did not reach. Against that procedural background, we limit ourselves to a brief statement in support of that request.

The second Question Presented raises a pure question of law. That issue is important both in its own particular terms and in general terms. The Executive Order's labor relations rule, barring the negotiation of PLAs, overrides one of the

most critical and sensitive of the NLRA's labor relations rules. This Court's decision on whether the Executive can take such a procurement action in the face of a federal statute, like the NLRA, that Congress enacted to occupy a regulatory field will not only determine whether the Executive has the authority to promulgate the particular rule at issue here, but given the nature of the case, will most certainly illuminate the greater question of whether the Executive has the authority to promulgate rules that override rules Congress has established as part of an exclusive statutory regulatory regime.

The legal issues raised by the two Questions Presented are so closely related that it would, we believe, serve the interest in the proper development of the law for the parties to brief and argue both questions to the Court at the same time and in the same proceeding. We therefore conclude by summarizing our argument for the proposition that Executive Order No. 13202 is a procurement action that improperly intrudes into the NLRA's exclusive regulatory territory and is invalid on that basis.

(a) The Executive Order rests on the Federal Property and Administrative Services Act ("the Procurement Act") and other, unspecified federal funding statutes. *See* Pet. App. 78a. As the D.C. Circuit has stated, the Procurement Act—and, we submit, these other funding statutes—are "designed to address . . . concerns quite different from the more focused question of the appropriate balance of power between management and labor in collective bargaining" that Congress addressed through the NLRA. *Chamber of Commerce v. Reich,* 74 F.3d 1322, 1333 (D.C. Cir. 1996). Equally to the point, nothing in the Procurement Act, or those funding statutes, gives the slightest basis for the proposition that Congress has granted the Executive procurement authority to promulgate labor relations rules that override the NLRA's labor relations rules. *Id.*

To the contrary, because an Executive Order may only "be enforced within the framework of Congress' legislative will," *United States v. Trucking Management, Inc.*, 662 F.2d 36, 42 (D.C. Cir. 1981), the President's authority to marshal his procurement authority to fashion his own labor relations regime is necessarily limited by the "the fixed intent of Congress [stated in the NLRA] and the policy behind that intent." *United States v. East Texas Motor Freight,* 564 F.2d 179, 185 (5th Cir. 1977). Accordingly, as the D.C. Circuit explained in *Chamber of Commerce*, when—as in this case—there

> is some tension between the President's Executive Order and the NLRA[, . . . t]o determine whether that tension constitutes unacceptable conflict [that makes the Order invalid,] we look to the extensive body of Supreme Court cases that mark out the boundaries of the field [Congress] occupied by the NLRA. Since the progenitors of these cases originally arose in the context of state actions that were thought to interfere with the federal statute, they are referred to collectively as establishing the NLRA "pre-emption doctrine." The principles developed, however, have been applied equally to federal governmental behavior that is thought similarly to encroach into the NLRA's regulatory territory. [74 F.3d at 1333-34.]

(b) In "mark[ing] out the boundaries of the field [Congress] occupied by the NLRA," *Chamber of Commerce*, 74 F.3d at 1333, this Court has developed "two distinct NLRA pre-emption principles," *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 748 (1985): *"Machinists* preemption," which prohibits government regulation of matters that Congress intended to leave "to be controlled by the free play of economic forces," *see Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 140 (1976) (citation omitted); and "*Garmon* preemption," which forbids government regulation of activities that are arguably

subject to NLRA §§ 7 or 8, *see San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244 (1959). As the District Court found in this case, Pet. App. 62a-66a, Executive Order No. 13202 runs afoul of both of these NLRA preemption principles.

The *Machinists* preemption principle reflects this Court's recognition that "Congress intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 488 (1960). The Executive Order is in the most direct conflict with this principle imaginable: whereas the NLRA explicitly authorizes construction managers and construction unions to freely negotiate PLAs, the Executive Order negates that explicit authorization by prohibiting the negotiation of such collective bargaining agreements.

The Executive Order equally offends *Garmon* preemption principles. In order to prevent conflict with Congress' "complex and interrelated federal scheme of law, remedy and administration," *Garmon,* 359 U.S. at 243, *Garmon* preemption forbids government regulation of activities that are "arguably subject to § 7 or § 8 of the [NLRA]," *id.* at 245. Congress enacted § 8(e) expressly to preserve to construction unions and construction employers the right, through a collectively bargained prehire agreement, to limit contracting and subcontracting on a construction site to those firms that agree to adhere to their bargaining agreement. *Woelke & Romero Framing,* 456 U.S. at 652-54. The Executive Order directly repudiates the "legislative goals that animated the passage of the §§ 8(e) and (f) exceptions for the construction industry," *Boston Harbor,* 507 U.S. at 230, by barring construction managers and construction unions from negotiating, and project owners from implementing, prehire agreements with clauses authorized by § 8(e) on any construction site receiving federal funds. Indeed, as dis-

cussed earlier, the Executive Order would have prohibited Kaiser and the local building trades council from negotiating, and the MWRA from implementing through its bid specifications, the PLA for the Boston Harbor cleanup—an agreement this Court recognized as a "valid labor contract under §§ 8(e) and (f)." *Id.* at 230.

In short, in this procurement action, the Executive has crossed the "boundaries of the field occupied by the NLRA," *Chamber of Commerce,* 74 F.3d at 1333, boundaries this Court has defined through its development of NLRA preemption principles. This Court should accordingly grant *certiorari* in this case, not only to clarify the meaning of the *Gould/Boston Harbor* proprietary/regulatory dichotomy, but to reinforce the preemption principles that deny the Executive the authority to "encroach into the [NLRA] regulatory territory." *Id.* at 1334.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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